DANA FRIX
ATTORNEY-AT-LAW

SWIDLER & BERLIN
CHARTERED

DIRECT DIAL
(202)424-7662

May 30, 1996

VIA HAND-DELIVERY

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Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98

Dear Mr. Caton:

Enclosed is an original and sixteen copies of the Reply Comments of WinStar Communications, Inc. in the above-captioned matter. Also enclosed is a copy to date-stamp and return in the self-addressed, stamped envelope.

Sincerely,

Dana Frix

Dana Frix

Counsel for WinStar Communications, Inc.

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20054

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MAY 30 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions of the	)	
Telecommunications Act of 1996	)	

REPLY COMMENTS OF
WINSTAR COMMUNICATIONS, INC.

Dana Frix
Mary C. Albert
Antony R. Petrilla
SWIDLER & BERLIN, CHTD.
3000 K Street, N.W., Suite 300
Washington, D. C. 20007
(202) 424-7662 (Tel)
(202) 424-7645 (Fax)

Timothy R. Graham
Robert M. Berger
Joseph M. Sandri, Jr.
WINSTAR COMMUNICATIONS, INC.
1146 19th Street, N.W.
Washington, D.C. 20036

Dated: May 30, 1996

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EXECUTIVE SUMMARY

The Commission's Rules on Collocation Must Set Forth a Technology-Neutral Standard and Specifically Recognize the Rights of Wireless Carriers to Access Roofs and Riser Conduit Owned or Controlled by LECs: The Commission should set national ground rules for collocation that are technology-neutral. In doing so, the Commission should expressly recognize the rights of microwave wireless carriers, such as WinStar, to access rooftops and riser conduit owned or controlled by incumbent LECs.

The Commission Has Jurisdiction to Issue Rules Under §§ 251 and 252: Section 251 of the Telecommunications Act directs the Commission to promulgate implementing regulations. In defining just, reasonable and nondiscriminatory rates, the Commission has authority to establish national pricing standards in accordance with the requirements of §252.

Rates for Interconnection and Access to Network Elements Should Not Include Contribution: The Commission must make clear that interconnection and network element rates established pursuant to § 252(d)(1) may not include contribution. Carriers must recover contribution from end users through retail rates, not from their competitors through rates charged for essential inputs. Rates set at total service long run incremental cost would not be confiscatory. Such rates would appropriately allow LECs to recover both incremental costs and the cost of capital.

Existing Agreements Between Incumbent LECs Are the Most Effective Proxy-Based Ceilings: The Commission's goal of designing a proxy-based ceiling that most effectively approximates the actual costs of the services provided would be best met by using the compensation arrangements in existing agreements between incumbent LECs. These agreements were entered into by parties of unquestionably equal bargaining power and have proved effective for many years.

Rates For Interconnection and Access to Network Elements May Not Include Embedded or Historical Costs, Nor May They Contain Universal Service Subsidies: In prohibiting the determination of rates for interconnection and access to network elements with reference to a rate-of-return or other rate-based proceeding, Congress forbid the recovery of embedded or historical costs. "Pay or play" schemes that bury universal service subsidies in interconnection or reciprocal compensation rates are also inconsistent with the intent of Congress.

Incumbent LECs Should Provision Service and Perform Repairs at Specified, Publicly-Disclosed Intervals that Do Not Exceed the Intervals Provided to Themselves, Their Affiliates or Most Favored Customers: The Commission's rules should compel incumbent LECs to publicly disclose provisioning and service intervals that do not exceed those provided to themselves, their affiliates and their most favored customers. The Commission should also implement a liquidated damages remedy to compensate new entrants for the incumbent LEC's failure to meet these intervals.

Existing Agreements Between Non-Competing LECs Must Be Submitted to State Commissions For Approval: Agreements between non-competing LECs must be submitted to State commissions for approval under § 252(a). The terms and conditions of these agreements must be made available to requesting carriers under § 252(i).

Carriers Are Entitled to Access the Terms and Conditions of "Any Interconnection, Service, or Network Element" Provided Under an Approved Agreement: Section 252(i) requires carriers to make available the terms and conditions for "any interconnection, service, or network element" provided under an approved agreement. Requesting carriers need not accept every term of an agreement to access the terms relevant to a specific interconnection, service or network element.

Bill and Keep Should be Mandated By the Commission, or State Commissions, Wherever Parties Cannot Agree on Terms for Mutual Compensation: Bill and keep is specifically sanctioned under the Act as an acceptable reciprocal compensation mechanism. Both this Commission and State commissions have the authority to order the use of bill and keep regardless of whether both parties agree. The Commission should mandate that incumbent LECs must make bill and keep available at the option of a requesting carrier.

Rates for Mutual Compensation Must Be Equal: The Commission's rules must require symmetry in terminating compensation rates to prevent incumbent LECs from abusing their superior bargaining power. The Act requires rates to be determined on the basis of a "reasonable approximation" of the additional costs of terminating a call. Using the incumbent LEC's costs to determine the mutual and reciprocal compensation rate would satisfy the "reasonable approximation" standard.

The Commission Should Establish Guidelines For Good Faith Negotiation: The Commission should prohibit incumbent LECs from engaging in strong-arm negotiating tactics, including requiring broad non-disclosure agreements as a precondition to negotiating. The Commission should also reiterate that State orders and regulations that are consistent with the Act remain in force and effect.

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Local Competition Provisions of the	)	
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REPLY COMMENTS OF
WINSTAR COMMUNICATIONS, INC.

WinStar Communications, Inc. ("WinStar"), by its undersigned counsel and pursuant to Section 1.415 of the Commission's rules, submits these reply comments[1] in accordance with the Commission's Notice of Proposed Rulemaking ("NPRM") in the above captioned proceeding.

I. THE COMMISSION'S RULES MUST RECOGNIZE WINSTAR'S RIGHT TO ACCESS INCUMBENT LECS' ROOF TOPS AND RISER CONDUIT (NPRM ¶¶ 66-73; 155-156)

In its initial Comments, WinStar asked the Commission to clarify that new entrants using wireless technology must be entitled to place transmission equipment on the roofs of incumbent local exchange carrier ("LEC") buildings where they collocate. WinStar explained that wireless new entrants will be transmitting voice and data signals from the incumbent LEC network through line-of-sight microwave dishes to their own networks. Unlike wireline carriers who would run fiber optic cable into the particular LEC building that is the site of collocation, WinStar would run cable from the point of collocation to its rooftop transmitter.

1/ WinStar has limited its reply comments to the issues most critical to its status as a wireless competitive local exchange carrier. Its failure to respond to each and every argument raised by the commenting parties should not be construed as agreement therewith.

No party specifically opposed allowing wireless new entrants to access incumbent LEC roof tops and riser conduit for purposes of interconnection and collocation.[2/] Thus, the Commission's rules should enunciate a technology-neutral standard and expressly make provisions for collocation by wireless new entrants. Consistent with the Act, this standard should provide wireless competitive local exchange carriers ("CLECs") with nondiscriminatory access and nondiscriminatory rates for rooftop mountings and use of riser conduit owned or controlled by incumbent LECs.

Some incumbent LECs assert that national rules on collocation are neither possible nor desirable.[3/] They claim that the details of collocation vary from location to location, from state to state and with the identity of the carriers involved.[4/] In addition, certain State commissions expressed concern that forcing carriers to fit into a national paradigm for collocation would have a negative impact on competition.[5/]

2/ Although no party voiced opposition to WinStar's position in this proceeding, WinStar has encountered some resistance from at least one incumbent LEC with respect to its proposal to use roof top space for purposes of collocation and interconnection. The LEC in question expressed concern that it had no experience interconnecting with wireless CLECs and sought delay to resolve technical issues. Because there is no material technical difference between running cable from the roof of a building and running cable from the basement, WinStar submits that such delays are unwarranted and underscore the need for the Commission to adopt technologically neutral interconnection and collocation standards

3/ BellSouth at 24, 47-49; ALLTEL at 9 (developing national collocation standards is "not an area that Congress has reserved for FCC jurisdiction").

4/ USTA at 19-20; Southwestern Bell at 64-65.

5/ Pennsylvania Public Utilities Comm'n at 20; Oklahoma Corporation Comm'n at 2-3; Virginia Corporation Comm'n at 2; Maryland Public Service Comm'n at 4-5.

WinStar agrees that national rules on collocation can only be so detailed before they become problematic. But, as many commenters recognize,[6] the Commission can ensure pro-competitive collocation policies around the country by setting certain ground rules. First and foremost, the Commission can and should affirmatively declare that collocation policies must be technology-neutral. Such rules would merely codify § 251(c)(6)'s requirement that incumbent LECs offer collocation on nondiscriminatory rates and terms. Moreover, the Commission should codify in its regulations that rates for rooftop mounting are nondiscriminatory only if they do not exceed the actual costs incurred by the incumbent LEC.

The Commission's rules also must clarify that where an incumbent LEC refuses to provide physical collocation, it bears the burden of proving lack of space or technical infeasibility. Also, WinStar agrees with AT&T that the Commission must establish a stringent standard for assessing technical infeasibility.[7]

As the Commission develops a technology-neutral collocation standard, it should explicitly and unambiguously delineate the rights of microwave wireless CLECs to collocate at LEC owned or controlled premises or facilities. This right should encompass the ability to use rooftops and riser conduit owned or controlled by incumbent LECs. The Commission should resist the

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[6] U.S. West at 3-4 ("The Commission should confine itself to material interpretation of the 1996 Act and the establishment of minimum interconnection and unbundling standards to facilitate interconnection negotiations"); Pennsylvania Public Utilities Comm'n at 20 (the FCC should set only minimum standards for collocation); Oklahoma Corporation Comm'n at 2-3 (national collocation rules should serve only as the minimum requirement); Virginia Corporation Comm'n at 2 (the FCC must devise only broad, flexible collocation rules).

[7] AT&T at 41-42; *see also,* Telecommunications Resellers Assn. at 47.

incumbent LECs' proposals to limit collocation to portions of LEC buildings where network operations are conducted.[8] While WinStar appreciates the concern that the absence of limitations on where collocation may occur could conceivably disrupt general administrative and customer service functions, it believes that such concerns, at this point in time, are speculative. A binding national rule on positioning collocation equipment would serve only to hinder good faith negotiations and likely would discriminate against certain technologies that may not fall within traditional collocation paradigms established for wireline carriers.

For similar reasons, the Commission should define "equipment" for purposes of collocation inclusively, not exclusively.[9] The range of technologies employed by present and future collocators outstrips the imagination. Any sort of exclusive definition would not be technology-neutral and may inhibit innovation. Congress declared that incumbent LECs must allow for "physical collocation of equipment *necessary* for interconnection or access to unbundled network elements." *See* § 251(c)(6) (emphasis added). Under this inclusive definition, equipment may be collocated if it is actually used to effect interconnection or access to unbundled network elements. The Commission's rules should specifically reference equipment used by microwave wireless CLECs to lessen resistance of incumbent LECs to such technology.

8/ Bell Atlantic at 33; Ameritech at 22-23; GTE at 23.

9/ ALTS at 21; AT&T at 40; General Communication, Inc. at 10.

WinStar is wary of having the Commission simply reinstitute its rules under the *Expanded Interconnection* order.[10] Those rules are not expressly technology-neutral and, as WinStar already is experiencing, likely would be manipulated to exclude wireless carriers like WinStar. The Commission may want to draw on its work in that proceeding, but should not do so without also pursuing a technology-neutral collocation standard.

For the Commission's reference, WinStar has attached hereto a model interconnection agreement that it has developed to address the issues unique to wireless CLECs.

II. THE ACT GRANTS THE COMMISSION BROAD JURISDICTION TO PROMULGATE REGULATIONS UNDER §§ 251 AND 252 (NPRM ¶¶ 37-40; 264-272)

Several incumbent LECs and State commissions claim that the Commission lacks authority to issue rules under §§ 251 and 252.[11] They argue that even after enactment of the Telecommunications Act of 1996, § 2(b) of the Communications Act precludes the Commission from exercising jurisdiction over intrastate telecommunications services. For example, GTE Service Corporation ("GTE"), asserts that:

10/ Cincinnati Bell Telephone at 14-15; Pacific Telesis at 37; Bell Atlantic at 32-35; NYNEX at 66-67; GTE at 24.

11/ *See, e.g.,* BellSouth at 8-9; Bell Atlantic at 4-8; Pacific Telesis at 14-15; D.C. Public Service Comm'n at 24; Maryland Public Service Comm'n at 2-3, 16; Ohio Public Utilities Comm'n at 11-12; Michigan Public Service Comm'n at 2-3.

> Under § 2(b) of the Communications Act, the FCC has no direct authority to regulate the rates, terms, or conditions for these local services and functions unless (1) it is explicitly given jurisdiction to do so by Congress . . . .

(GTE at 3). Rather than buttressing the position of its comrades, GTE actually suggests the weakness in the jurisdictional argument. GTE is correct that § 2(b) does not strip the Commission of jurisdiction that Congress has explicitly granted. What GTE fails to mention is that Congress has explicitly granted the Commission jurisdiction over local exchange service in § 251(d) of the Act:

> Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

It is difficult to imagine how Congress could have authorized the Commission to promulgate rules under § 251 any more explicitly. Congress not only authorized regulations, it emphasized the urgency of its command by demanding them within six months.

The Commission's jurisdiction also extends to the formulation of regulations governing procedures for negotiation, arbitration, and approval of interconnection agreements under § 252. If the Commission, acting under § 252(e)(5), preempts the authority of a State commission that "fails to act to carry out its responsibility" under § 252, it needs regulations to supervise the negotiation and arbitration processes. The Commission has residual jurisdiction to adopt regulations related to any task that Congress has assigned.[12/] Using this authority, it may interpret both the procedural and substantive requirements of § 252, including the pricing standards.

12/ "The Commission may perform any and all acts, *make such rules and regulations*, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions." 47 U.S.C. 154(i) (emphasis supplied).

A. The Commission Has Jurisdiction To Implement National Pricing Standards Under § 252(d) of the Act (NPRM ¶¶ 117-157)

WinStar and numerous other parties demonstrated in their initial Comments that the Commission's promulgation of national pricing standards is necessary to facilitate the negotiation and arbitration processes and speed the entry of competitive local exchange service providers.[13/] Congress conferred jurisdiction on the Commission to adopt national pricing standards by authorizing it to establish regulations to implement the requirements of § 251 of the Act. Sections 251(c)(2) and (c)(3) provide that incumbent LECs must offer interconnection and access to network elements at just, reasonable and nondiscriminatory rates, terms and conditions in accordance with the provisions of §§ 251 and 252. Section 252(d) sets forth the pricing standards that must apply in determining the justness and reasonableness of the rates for interconnection and access to network elements. Thus, Congress clearly contemplated that the Commission's implementing regulations would address pricing standards.

Despite these express provisions and the overall intent of the Act to open the local exchange market to competition, certain State regulatory commissions contend that this Commission has jurisdiction over interstate matters only and has no authority to adopt national pricing standards that will be binding on the States.[14/] They even go so far as to assert that the

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13/ *See, e.g.,* ALTS at 33; Ameritech at 59; AT&T at 45-46; Cable and Wireless at 32-33; ITI at 4-5; National Cable Television Assn. at 8-10; Time Warner at 45-47; Department of Justice at 25.

14/ *See, e.g.,* Ohio Public Utility Comm'n at 36-38; D.C. Public Service Comm'n at 24-28; Virginia State Corporation Comm'n at 2; Oregon Public Utility Comm'n at 19; Massachusetts Department of Public Utilities at 3-4 (states may lawfully disregard any pricing principles adopted by this Commission).

Commission is barred from implementing any standards or regulations that are inconsistent with State law or policy. In a misguided attempt to preserve unfettered control over local exchange service and competition, these State commissions have misconstrued the Act in a manner that would gut entirely the important implementing role of this Commission.

Contrary to the view of the States, the Commission could not possibly comply with the Congressional directive to establish regulations to implement the Act without impinging on traditionally intrastate areas. The § 251(c) obligations imposed on incumbent LECs lie at the very heart of the Act. These obligations specifically extend to interconnection for the transmission and routing of local telephone traffic, access to network elements used in the provision of local telephone service, collocation of equipment necessary for such interconnection and access, and the resale of any local telephone service that a LEC offers at retail to end users. Moreover, Congress has mandated throughout the Act that only those State regulations, orders or policies that are not inconsistent with the Act or Commission regulations may continue to be enforced. *See* §251(d)(3) (the Commission shall not preclude enforcement of State regulations, orders or policies applicable to local exchange carriers that are consistent with, and do not substantially prevent implementation of the requirements and purposes of, the Act); §252(c) (States must comply with the Act and Commission regulations in resolving issues by arbitration); §252(e)(2) (States must reject agreements adopted by arbitration that do not meet the requirements of the Act or Commission regulations); §252(e)(5) (the Commission shall preempt State commissions that fail to carry out their responsibilities in reviewing or arbitrating interconnection agreements); §252(f) (a State commission shall not approve a Bell operating company's statement of generally available terms and conditions unless it complies with the Act and Commission regulations); §253(a) (no State may prohibit any entity from providing any intrastate telecommunications service); §254(f) (a State may adopt regulations to preserve and advance universal service only to the extent that such regulations are not inconsistent with the Commission's rules). In light of Congress's explicit delegation of authority to the Commission to promulgate implementing regulations and to preempt the enforcement of inconsistent State regulations and policies, the Commission must reject any argument that it lacks jurisdiction to adopt national pricing standards.

III. PRICING STANDARDS FOR INTERCONNECTION NETWORK ELEMENTS

A. Incumbent LEC Prices For Interconnection And Access To Network Elements Must Not Include Contribution (NPRM ¶ 121)

WinStar and other parties persuasively argued in their initial Comments that the Commission's pricing standards for interconnection and access to network elements should not include any contribution to overhead or joint and common costs.[15] As the Department of Justice noted, prices set at the incumbent LEC's total service long run incremental cost ("TSLRIC") will encourage efficient entry and minimize the ability of incumbent LECs to engage in anticompetitive pricing strategies. (Department of Justice Comments at 30-33).

The incumbent LECs and certain State commissions argue that interconnection and network element prices should include a markup for joint and common costs and overhead.[16]

15/ *See, e.g.,* AT&T at 37; Jones Intercable at 25-26; Department of Justice at 32.

16/ *See, e.g.,* Bell Atlantic at 35-36; BellSouth at 52-53; NYNEX at 50-51; Pacific Telesis at 68-69; Ameritech at 62-79; Cincinnati Bell at 25-30; GTE at 61; Ohio Public Utilities Comm'n at 41-47 (prices should be set at long run incremental cost plus 10% plus joint and common costs); Rural Telephone Coalition at 25-29; TCA at 8; Texas Public Utility Comm'n at 23; USTA (continued...)

They suggest that, without such a markup, the incumbent LECs either will not be able to recover their total costs or will be forced to increase rates on other services. Such rationalizations may be appropriate in the context of a rate-of-return or other rate-based proceeding, but they cannot be reconciled with the pricing standard set forth in § 252(d)(1) of the Act. Section 252(d)(1) states that the rates for interconnection and access to network elements shall be based on the cost of providing the interconnection or network element. Rates that include other costs, such as overhead or joint and common costs, and rates that are designed to assure a particular revenue requirement, exceed the explicit parameters established by Congress.

In a competitive marketplace, incumbent LECs should recover their overhead and joint and common costs in their retail end user rates, as they do today. Sanctioning a markup on the prices for essential inputs sold to competitors will afford incumbent LECs excessive and unreasonable latitude to disproportionately assign overhead and joint and common costs to such inputs, thereby placing their competitors in a price squeeze. This is more than a theoretical possibility. GTE and the Massachusetts Department of Public Utilities, for example, argue that contribution should be allocated using Ramsey pricing principles. (GTE at 63-64; Massachusetts Department of Public Utilities at 11-12). Ramsey pricing dictates that the prices for the least competitive elements should include the highest markup. Such a pricing strategy would allow the incumbent LECs to artificially suppress the retail prices against which new entrants must compete and solidify their already overwhelming competitive advantage through excessive markup on essential inputs. As

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[16/](...continued)
at 41-46; Massachusetts Department of Public Utilities at 11-12.

the Department of Justice explained, "by misallocating costs from competitive activities to activities that supply 'captive' customers, the ILECs can raise the price of network elements to the captive customers, and escape having to recover those costs from competitive activities." (Department of Justice at 30-31).

The Commission should reject the argument that setting interconnection and network element prices at TSLRIC would violate the Fifth Amendment's taking clause. Rates set at TSLRIC would fully compensate the incumbent LECs for the incremental or additional costs of providing the services as well as allow them to recover the cost of capital.

The Commission also must bear in mind that authorizing incumbent LECs to shift their joint and common costs and overhead to their competitors will eliminate any incentive for the incumbent LECs to reduce those costs or increase the efficiency of their operations. As WinStar stated in its initial Comments, capping interconnection and network element rates at TSLRIC (which includes a reasonable profit) is necessary to satisfy the § 252(d) pricing standards, ensure efficient entry and create the opportunity for competitive carriers to vie for customers in the retail market on terms that reflect the overall efficiencies of their operations.

B. The Rates Contained In Existing Interconnection Agreements Between Incumbent LECs Should Serve As Proxy Ceilings (NPRM ¶¶ 134-143)

WinStar and other parties demonstrated in their initial Comments that proxy-based rate ceilings may serve as an effective mechanism to constrain the pricing behavior of incumbent LECs pending the development of accurate cost information against which State commissions may judge the justness and reasonableness of proposed rates in arbitration proceedings. For the reasons stated in WinStar's Comments, the Commission should use the rates in existing agreements between incumbent LECs as the proxy ceiling. The fact that the compensation arrangements reflected in existing agreements between incumbent LECs have been in place for many years demonstrates that they are workable. As a result, incumbent LECs will not be in a position to allege that the use of these rates will force them to subsidize their competitors or deprive them of the ability to recover their full costs. Because, as explained more fully below, § 252(i) of the Act requires that existing interconnection agreements be submitted to State commissions for approval and that the rates, terms and conditions of approved agreements be made available to requesting carriers, implementation of such a proxy would be the most administratively simple solution.

C. Section 252(d)(1) Precludes States From Allowing Incumbent LECs to Factor Historical, Embedded Costs Or Universal Services Subsidies Into The Rates Charged For Interconnection And Network Elements (NPRM ¶¶ 144-145)

Not surprisingly, the incumbent LECs argue that prices for interconnection and network elements should reflect their embedded or historic costs.[17] As WinStar and many other parties demonstrated, however, any such pricing approach would be directly contrary to the plain language of § 251(d)(1) of the Act and inconsistent with the incentive-based alternative regulation plans being implemented by States in response to the incumbent LECs' pleas for pricing flexibility to meet competition.

Under traditional rate-of-return regulation in a monopoly environment, incumbent LECs have been allowed to recover their historic or embedded costs. Rate-of-return regulation eliminated any incentive for incumbent LECs to operate efficiently and allowed them to

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17/ *See, e.g.,* Ameritech at 67-69; USTA at 41, 55-56.

manipulate their reported costs to ensure recovery of costs incurred for inefficient network architecture, design and technology.[18] By specifically prohibiting States from using a rate-of-return methodology to determine interconnection and network element costs in § 251(d)(1) of the Act, Congress clearly intended that incumbent LECs be precluded from recovering their embedded and historic costs in the rates charged competitors for essential inputs.

Moreover, as TCI persuasively argued, incumbent LECs already have been compensated for historical and embedded costs in the risk premiums included in their allowed rates of return. If those rates of return were inflated over the last 20 years to reflect the risk that the local exchange market would be opened to competition, allowing incumbent LECs to shift their embedded costs to competitive carriers would yield a double recovery. (TCI at 30-31).

Section 254's directive that universal service costs be recovered in an explicit, competitively neutral manner from all providers of telecommunications services prohibits the inclusion of universal service subsidies in the rates charged for interconnection and network elements. For this reason, the Commission must reject the suggestion of the Massachusetts Department of Public Utilities that interconnection rates should include universal service support subsidies pending the Commission's establishment of a universal service fund.[19] Nor is there any economic rationale for inflating interconnection rates by an undefined amount to subsidize universal service in the absence of a clear cut showing that an incumbent LEC does not recover its costs in the rates charged for basic local exchange service. Any such subsidies simply would

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18/ AT&T Comments, Affidavit of William Baumol, Janusz Ordover and Robert Willig at 10-11.

19/ Massachusetts Department of Pubic Utilities at 11-12.

constitute a windfall for the incumbent LECs.[20]

The Commission also should make clear that New York's "pay or play" scheme, pursuant to which competitive carriers who agree to serve all customers pay a substantially lower interconnection rate than those who serve more selective markets, cannot survive the passage of the Act. Although NYNEX takes great pains to convince the Commission that the pay or play scheme is consistent with the competitively neutral universal service funding mechanisms contemplated by the Act (NYNEX at 94-98), its arguments do not withstand scrutiny and must be rejected. NYNEX contends that the pay or play rule "was not intended to be a 'funding' mechanism that would precisely allocate any subsidies associated with the provision of Lifeline, residential exchange access or other services deemed important enough to warrant 'universal service' protection." (Id. at 94). Contrary to NYNEX's contention, however, the New York Public Service Commission expressly has stated that the carrier access charges applicable to payers "include a contribution to the costs of universal service" that would fund the continued provision of universal service.[21] Because the subsidies included in the local interconnection rates are not explicit, specific, predictable or recovered from all telecommunications carriers on a competitively neutral basis, they are not permitted by the Act.[22]

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[20] Authorizing such implicit subsidies would also be plainly inconsistent with § 254(k) of the Act, which provides that a telecommunications carrier may not use services that are non-competitive to subsidize services that are subject to competition.

[21] Case No. 94-C-0095, "Order Instituting Framework for Directory Listings, Carrier Interconnection and Intercarrier Compensation" at 13 (N.Y.P.S.C., September 27, 1995).

[22] Section 254(f) provides that a state may only adopt universal service regulations that are consistent with the Commission's universal service regulations. States are further limited to (continued...)

NYNEX also asserts (at 95) that New York's pay or play scheme is authorized by § 254(f) of the Act, which reserves to States the power to adopt their own measures to preserve and advance universal service. While the Act does reserve such power to the States, it is not unqualified. If a State does adopt its own universal service measures, it must require telecommunications carriers providing intrastate service to contribute to those measures on an "equitable and nondiscriminatory basis." A pay or play scheme, which forces some local exchange carriers to pay higher interconnection rates than others to fund the continued support of universal service, simply does not meet this test.

IV. THE COMMISSION'S RULES SHOULD COMPEL INCUMBENT LECS TO PROVISION SERVICE AND PERFORM REPAIRS AT SPECIFIED, PUBLICLY-DISCLOSED INTERVALS THAT DO NOT EXCEED THE LECS' OWN PROVISIONING AND REPAIR INTERVALS (NPRM ¶¶ 60-63)

The incumbent LECs insist that national provisioning and repair standards would be impracticable on account of significant variations between LEC networks and local conditions.[23/] For instance, Bell Atlantic (at 31) argues that: "[a]dministrative and operating support systems differ among LECs, and different LECs may have different types of test equipment." Similarly, GTE asserts (at 2) that

> national rules regarding such matters as installation and repair intervals would necessarily ignore considerable and legitimate variations among [incumbent LECs]

22/ (. . . continued) adopting "regulations to ... preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms."

23/ GTE at 21, 24; Bell Atlantic at 31; Pacific Telesis at 43; USTA at 21; Cincinnati Bell Telephone at 17.

and would produce arbitrary results when applied across the board.

While WinStar recognizes that provisioning and repair intervals may vary from LEC to LEC, the Commission should require each incumbent LEC to specify, and publicly disclose, provisioning and repair intervals that do not exceed the intervals provided to itself, its affiliates and most favored customers. In this way, the Commission would avoid dictating specific national provisioning and repair intervals that would bind every incumbent LEC, yet it would assure that new entrants are not treated in a discriminatory manner.[24/] Incumbent LECs can hardly disagree with WinStar's proposed maximum provisioning and repair interval because the Act requires as much when it states that the interconnection provided to new entrants must be "at least equal in quality to that provided by the [incumbent] local exchange carrier to itself or to any subsidiary, affiliate or any other party to which the carrier provides interconnection." § 251(c)(2)(C).[25/] To the extent that "different state standards" exist, they should be preempted only if they are less stringent than the Commission's standards.[26/]

As WinStar stated in its initial Comments, new entrants should be compensated for an incumbent LEC's failure to observe provisioning and repair intervals through liquidated

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24/ BellSouth's argument that "no further 'guidance'" on § 251(c)(2)(C) is needed (BellSouth at 20) should be rejected. By requiring that the Commission promulgate rules, Congress clearly recognized that the Act is not self-effectuating.

25/ *Compare* Southwestern Bell at 37 (incumbent LECs "should simply be required to provide the same installation, service and maintenance intervals to competitors as they do to their own customers").

26/ *See* Bell Atlantic at 31 ("LECs may be subject to different state service standards"); Southwestern Bell at 37.

damages.[27] Although it is possible that some State commissions may promulgate rules on liquidated damages,[28] the Commission must establish a national standard under § 251(c)(2)(C), at the very least to protect competitive carriers in those States that do not adopt such rules.

There is no merit to BellSouth's argument that "[o]ne-sided liquidated damages requirements . . . clearly are not warranted." (BellSouth at 20). Section 251(c)(2)(C) applies to incumbent LECs only. Recognizing that new entrants need more safeguards, Congress determined that incumbent LECs must assume more stringent duties and structured the Act accordingly. Because no parallel "equal in quality" interconnection standard applies to new entrants, the Commission need not make liquidated damages requirements two-sided.

V. SECTION 252(i) AFFORDS CARRIERS ACCESS TO THE TERMS AND CONDITIONS OF "ANY INTERCONNECTION, SERVICE, OR NETWORK ELEMENT" PROVIDED UNDER AN APPROVED AGREEMENT (NPRM ¶¶ 171; 269-72)

A. The Terms and Conditions Of Existing Agreements Between Incumbent LECS Must Be Made Available To All Requesting Carriers (NPRM ¶ 171)

The incumbent LECs vigorously argue that the terms and conditions of their existing agreements with other non-competing incumbent LECs need not be made available to new entrants under § 252 of the Act because the Act only governs the relationship between competing carriers.[29] The Commission must reject this strained interpretation as contrary to the clear

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27/ *See also* Telecommunications Resellers Assn. at 44-45.

28/ *See* GTE at 21.

29/ Pacific Telesis at 83-84; Cincinnati Bell at 9-10; Southwestern Bell at 53-54. The Ohio Public Utility Commission takes a similar position, asserting that contracts between (continued...)

directives of §§ 251 and 252.

Section 251(a) of the Act imposes upon *all* telecommunications carriers the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Section 252(b) imposes additional duties upon all local exchange carriers (incumbents and new entrants), including the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications and the duty to provide nondiscriminatory access to operator services, directory assistance and directory listings. Existing agreements between non-competing incumbent LECs address interconnection, reciprocal compensation and access to operator and directory services.

Section 252(a) states in no uncertain terms that any interconnection agreement, "including any interconnection agreement negotiated before the date of the Telecommunications Act of 1996 *shall* be submitted to the State commission" for approval. (Emphasis supplied.) Once approved, the terms and conditions of those agreements must be made available to any requesting carrier under § 252(i). Neither the language of § 252(a) or of 252(i) limits the agreements that must be filed, approved and made available to other carriers to agreements between competing carriers.[30/] Pacific Telesis's and Southwestern Bell's claim that the only agreements required to be filed with a State commission under §252(a)(1) are those reached upon receiving a request for

[29/](...continued)
neighboring LECs should be made available only to new entrants that do not compete with the incumbents. (Ohio Public Utility Comm'n at 77).

[30/] *See also* AT&T at 88-89; Ohio Office of Consumer Counsel at 6; Oregon Public Utility Comm'n at 33.

interconnection, services or network elements pursuant to section 251 (Pacific Telesis at 83; Southwestern Bell at 9) are flatly contrary to the Act, and render meaningless the requirement that agreements negotiated by incumbent LECs *before* the date of enactment of § 251 must be submitted for approval to State commissions.

As WinStar noted in its initial Comments, existing agreements between incumbent LECs reflect the cooperative co-carrier relationships necessary to achieve optimal interoperability and service transparency to end users. Because the parties to these agreements are not competitors, the rates very likely approximate the true costs of the services provided. It is undoubtedly for these reasons that the incumbent LECs object to making the terms and conditions of the agreements available to their competitors. The Act, however, affords incumbent LECs no such protection.

B. Requesting Carriers Are Not Limited To An All-Or-Nothing Choice (NPRM ¶¶ 269-272)

The Commission should dismiss the notion propounded by BellSouth that § 252(i) grants requesting carriers the right to access an "interconnection, service, or network element" in an approved agreement only if they accept *every* term and condition in the agreement. (BellSouth at 80-83). Contrary to BellSouth's interpretation, §252(i) states that a LEC must

> make available *any* interconnection, service, or network element provided under an agreement approved under [§ 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Emphasis supplied. There is nothing in this language to suggest that agreements must be made available to other carriers only in their entirety. Rather, carriers may select *any* interconnection,